87-1513

No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The court below affirmed an administrative authorization for bank affiliates to underwrite securities, including securities prohibited to banks themselves, and permitted that activity on a scale equalled only by the largest investment houses in the country. A bare majority of the Federal Reserve Board had granted the authority, despite Section 20 of the Glass-Steagall Act which prohibits bank affiliates from being "engaged principally" in underwriting "securities."

1. Did the court below err in rejecting a literal application of the term "securities" in Section 20 of the Glass-Steagall Act and excluding from that term those securities banks themselves may underwrite, even though this Court has held the term "securities" is to be applied literally and Section 20 contains no exception for any securities at all?

2. Did the court below err in construing the "engaged principally" restriction in Section 20 as authority for banks to affiliate again with entities that may rank among the largest underwriters of privately issued securities in the nation, even though Congress enacted Section 20 specifically to divorce commercial banks from their securities underwriting affiliates?

PARTIES TO THE PROCEEDING

In addition to the petitioner[1] and respondent listed in the caption, the following are also respondents in this action: Alan Greenspan, as Chairman of the Board of Governors of the Federal Reserve System,[2] Manuel H. Johnson, Martha R. Seger, Wayne D. Angell and H. Robert Heller as Members of the Board of Governors of the Federal Reserve System; and Bankers Trust New York Corporation, J.P. Morgan & Co., Inc., Citicorp, Chase Manhattan Corp., Manufacturers Hanover Corp., Chemical New York Corp. and Security Pacific Corp. as Intervenors-Respondents-Cross-Petitioners below.

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1 Pursuant to Rule 28.1 of this Court, petitioner states as follows: the Securities Industry Association is a national trade association representing more than 500 securities brokers, dealers and underwriters who are responsible for over 90 percent of the securities brokerage and investment banking business in the United States.

2 Paul A. Volcker, Chairman Greenspan's predecessor as Chairman of the Board of Governors of the Federal Reserve System, was named as a respondent below. Chairman Greenspan, who succeeded Mr. Volcker while the case was pending below, has been substituted as a respondent pursuant to Rule 40.3 of this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Securities Industry Association ("SIA") respectfully requests that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 8, 1988.

OPINIONS BELOW

The initial Order of the Board of Governors of the Federal Reserve System ("Board") is reported at 73 Fed. Res. Bull. 473 (1987) (53a).[1] The subsequent Orders of the Board are reported at 73 Fed. Res. Bull. 607, 616, 618, 620 and 622 (1987) (146a, 151a, 156a, 160a, 166a and 171a). The opinion of the United States Court of Appeals for the Second Circuit granting a stay

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1 Citations herein to material printed in the Appendix appear as "____a."

of the Board's orders is unreported. The order of the court of appeals denying the SIA's Petition for Review (1a) is not yet reported. The further order of the Court of Appeals staying the issuance of its mandate pending SIA's filing of a petition for a writ of certiorari with this Court is unreported.

JURISDICTION

The Court of Appeals for the Second Circuit issued its opinion on February 8, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the prohibitions of the Glass-Steagall Act.[2] Enacted in 1933, that Act was designed "to prohibit commercial banks . . . from going into the investment banking business" directly or indirectly.[3]

Two sections of the Act, Sections 16 and 21, govern the securities activities of banks directly. Section 16 flatly prohibits national banks from underwriting "any issue of securities or stock" and equally bars such banks from dealing for their own account in such instruments. 12 U.S.C. § 24 (Seventh). Section 16, however, contains a limited, express exemption for specified general obligations of the federal and state governments and certain government agencies (hereafter "government securities" or "eligible securities").[4] Section 21 of the Act also pro-

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2 What is generally referred to as the Glass-Steagall Act comprises four sections of the Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162, and is codified in sections of Title 12 of the United States Code, 12 U.S.C. §§ 24 (Seventh), 78, 377 and 378. Relevant provisions of the Act are set forth in Appendix H to this Petition.

3 *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 629 (1971) ("*ICI* I").

4 As used throughout this petition, the terms "government securities" or "eligible securities" mean those instruments expressly exempted from the underwriting and dealing prohibitions in Section 16 of the Glass-Steagall Act.

hibits member banks from being "engaged" in underwriting or dealing in "stocks, bonds, debentures, notes, or other securities," but expressly excludes from its prohibitions the government securities exempted from Section 16. 12 U.S.C. § 378(a)(1).

Two other sections of the Act, Sections 20 and 32, govern indirect securities activities of banks. Section 32 prohibits personnel interlocks between member banks of the Federal Reserve System and firms "primarily engaged" in underwriting "securities" without qualification. 12 U.S.C. § 78. This section does not contain any exemption from its prohibitions for government securities but does permit the Board by regulation to exempt certain "classes of cases" from the section's prohibitions. Section 20 of the Act, the section directly involved here, prohibits affiliation between member banks and entities "engaged principally" in underwriting and dealing in "securities," also without qualification. 12 U.S.C. § 377. Unlike the other sections of the Act, Section 20 contains neither an express exception for government securities nor any grant of exemptive authority to the Board.

Section 20 provides in relevant part:

> [N]o member bank [of the Federal Reserve System] shall be affiliated . . . with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

STATEMENT OF THE CASE

At issue is the first decision since Congress passed the Glass-Steagall Act in 1933 that permits commercial banking organizations as principals to underwrite and deal in nongovernmental securities.[5]

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5 As in the opinion of the Court below (22a), the phrase "underwrite and deal" will be used in this petition as a shorthand designation for all the activities prohibited by Section 20, *i.e.*, "flotation, underwriting, public sale or distribution" of securities.

A. The Administrative Proceedings

1. The Applications

Citicorp, the nation's largest banking organization and corporate parent of the nation's largest commercial bank, applied to the Board in 1985 for permission to underwrite as principal and deal for its own account in certain securities. It proposed to launch this new business through an affiliate, Citicorp Securities, Inc. ("CSI").[6] CSI would underwrite municipal revenue bonds, mortgage-related securities and consumer-receivable-related securities, together with government securities. (53a.) Citicorp contended that government securities should be considered beyond the scope of the term "securities" in Section 20, because they were exempted from Section 16 of that Act.[7] Proposing to limit CSI's underwriting of nongovernmental securities to ten percent of CSI's total underwriting activity, Citicorp argued that CSI therefore would not be "engaged principally" in underwriting "securities" in violation of Section 20. (64a.)

After Citicorp submitted its application, six of the nation's other largest money center banks submitted virtually identical applications, but adding commercial paper to the list of securities they proposed to underwrite.[8] Ultimately, thirteen of the largest banking organizations in the country requested the new

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6 *See* 50 Fed. Reg. 20,847 (1985). Citicorp, a bank holding company, submitted its application pursuant to Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843(c)(8).

7 62a. In 1984, under the Bank Holding Company Act, the Board had authorized bank holding company affiliates to underwrite government securities. 12 C.F.R. § 225.25(b)(16).

8 *See* 50 Fed. Reg. 41,025 (1985) (J. P. Morgan & Co.); 51 Fed. Reg. 16,590 (1986) (Bankers Trust); 51 Fed. Reg. 42,300 (1986) (Chemical New York Corp.); 52 Fed. Reg. 1,380 (1986) (Chase Manhattan Corp.); 52 Fed. Reg. 6,218 (1986) (Manufacturers Hanover Corp.); and 52 Fed. Reg. 8,365 (1986) (Security Pacific Corp.). J. P. Morgan & Co. did not request permission to underwrite or deal in consumer-receivable-related securities. (54a n.2.) Citicorp subsequently submitted an application seeking to add commercial paper to CSI's permitted activities. 52 Fed. Reg. 13,317 (1986).

underwriting power under the novel theory proposed by Citicorp.[9]

2. Rulings of the Board Majority

After receiving and considering public comments on the initial three applications, the Board held a rare day-long public hearing. Following this hearing, by a narrow 3-2 vote (Chairman Volcker and Governor Angell dissenting), the Board conditionally approved the Citicorp, Morgan and Bankers Trust applications.[10] Two weeks later, by an identical vote, the Board approved the four remaining applications before it at that time.[11]

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9 In addition to the companies listed in note 8, *supra*, the following banking organizations have requested authority to underwrite and deal in these permitted securities: PNC Financial Corp., 52 Fed. Reg. 13,757 (1987); Marine Midland Corp., 52 Fed. Reg. 17,829 (1987); First Interstate Bancorp, 52 Fed. Reg. 32,606 (1987); Bank of New England Corp., 52 Fed. Reg. 43,799 (1987); First Bank System, Inc., 53 Fed. Reg. 2,782 (1987) and Bank of Boston Corp., application dated Jan. 28, 1988.

10 53a. The Board did not permit underwriting of consumer-receivable-related securities at the time, asking for further information concerning the market for these securities. (94a.) The Board, however, did subsequently approve each of the requests to underwrite and deal in such securities. 73 Fed. Res. Bull. 731 (1987).

11 The Board approved the subsequent applications of Chase Manhattan, Security Pacific, Manufacturers Hanover, and Chemical by Orders dated May 18, 1987, for the reasons set forth in its April 30, 1987 Order approving the Citicorp, Morgan and Bankers Trust applications. *See* 146a, 151a, 160a and 166a. At the same time, the Board approved a separate application of Citicorp for CSI to underwrite commercial paper. 156a.

The Board has continued to approve applications by various banking organizations to underwrite securities since this case was submitted to the court below. *See* PNC Financial Corp., 73 Fed. Res. Bull. 742 (1987); Marine Midland Corp., 73 Fed. Res. Bull. 738 (1987); First Interstate Bancorp, 73 Fed. Res. Bull. 928 (1987); Bank of New England Corp., 74 Fed. Res. Bull. 133 (1988). The SIA has petitioned the court below for review of each of those Orders; those petitions have been withdrawn from active consideration pending final disposition of this case.

The Board majority recognized the "precedent-setting" nature of the applications and observed that its ruling addressed "fundamental questions concerning the scope of the Glass-Steagall Act's restrictions." (58a, 57a.) The majority also acknowledged that

> on its face, section 20 draws no distinction between eligible [*i.e.*, government] and ineligible securities, as is the case under other sections of the Glass-Steagall Act. The section simply contains a prohibition on a member bank's affiliation with any corporation engaged principally in underwriting "stocks, bonds, debentures, notes, or other securities."

(67a.) The majority, however, ruled the term "securities" in Section 20 did not encompass all securities. Instead, the majority concluded that the express exemption in Section 16 for banks to underwrite specified government securities should "*a fortiori*" apply to bank affiliates, notwithstanding the absence of any similar exception for affiliates in Section 20. (67a-68a.) To conclude otherwise, the majority reasoned, "would be out of harmony with the central purpose of the Act." (70a.)

Based upon its "central purpose" analysis, the majority determined a bank could create an affiliate that would engage *exclusively* in underwriting securities, so long as the underwriting of securities not authorized for banks themselves does not amount to a "substantial" part of the affiliate's overall business. (76a.) The majority found the permitted level of the latter activities to constitute (a) "a range of between 5 and 10 percent" of an affiliate's total revenues and (b) up to ten percent of the market for each type of nongovernmental security. (83a.) In those circumstances, the majority ruled, the affiliate would not violate the Section 20 prohibition against affiliates being "engaged principally" in underwriting securities. It made no difference to the majority that an affiliate would regularly underwrite and deal in "ineligible" securities or that its business in that

respect could rank it among the country's largest investment houses in a given market.[12]

The majority conceded that, at the volume level authorized, the new underwriting and dealing activities raised various of the "fundamental hazards at which the Glass-Steagall Act was aimed." (115a.) The majority therefore constructed "an extensive framework of prudential limitations" (134a) to govern the proposed activities and concluded that the applications "comply with existing law under the framework established." (127a.)

3. The Board Dissents

Chairman Volcker and Governor Angell dissented. They found the majority's result directly inconsistent with the language and policy of the Glass-Steagall Act. In their view:

> the plain words of the statute, read together with earlier Supreme Court and circuit court opinions, as we understand them, indicate that government securities are indeed "securities" within the meaning of section 20. Consequently, it appears to us that the applications approved today, as a matter of law, involve affiliations of member banks with corporations that are in fact not only "principally engaged" in dealing and underwriting in securities, but in fact would be wholly engaged in such activities . . . .

(136a-137a.) The dissenters observed that the majority ruling would make legally possible the "affiliations of banks with some of the principal underwriting firms or investment houses of the country," thereby violating the "intent of Congress" as well as the statutory language. (137a.)

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12 83a-85a. Because of the Applicant's lack of experience in underwriting and trading the nongovernmental securities, the Board initially limited the affiliates to the "5 percent end of the permissible range of activity," but committed to "review this determination, within one year, after Applicants have gained some experience in operating the proposed underwriting subsidiaries, to assess whether somewhat higher levels of activity up to 10 percent may be permissible." (84a-85a).

B. The Opinion Below

The SIA immediately petitioned the United States Court of Appeals for the Second Circuit to review the Board's Order. At the same time, the SIA asked the court to stay the effective date of the Board's Order pending judicial review. The court granted the requested stay, and subsequently expanded it to stay the later-issued Board Orders as well.[13] Seven banks intervened and filed cross-petitions for review of the Board's Orders. The court of appeals denied SIA's petition for review on February 8, 1988. (1a.)

The court acknowledged in its decision that the Board's rulings would permit commercial banks to expand into underwriting nongovernmental securities and to that extent would "dismantle the wall of separation installed between [commercial and investment banks] by the Glass-Steagall Act." (5a.) The court also recognized that "on the surface § 20 would appear to refer" to all kinds of "securities," including government securities. (13a.) The court further noted that the Board itself had held the unqualified term "securities" to encompass government securities in a long-standing Glass-Steagall interpretation equally applicable to Section 20. (15a-16a.) And, citing this Court's teaching, the court confirmed that unambiguous statutory language "must be given effect by the agency and the courts." (13a.)

The court, however, determined not to give effect to the plain meaning of the term "securities" in Section 20. The court reasoned that the Act contains three different references to "securities" and that Congress had amended Section 21 of the Act to clarify that its prohibition of banks' underwriting "securities" did not apply to government securities. (14a.) Accordingly, "with some confidence," the court of appeals concluded the term "securities" in Section 20 was "ambiguous." (*Id.*) In doing so, the court did not discuss this Court's earlier admonition that the unqualified term "securities" in the Glass-Steagall Act

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13 *Securities Industry Ass'n* v. *Board of Governors*, No. 87-4041 (2d Cir. Order dated May 19, 1987).

is to be applied as it is written. *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137 (1984).

Rejecting full deference to the Board's views because of the Board's failure to discuss its own earlier ruling concerning the breadth of the term "securities," the court undertook its own review of the Act's legislative history. (17a.) The court concluded Section 20 represented a "compromise" between Senators who wanted to legislate securities affiliates out of existence and those who wanted merely to subject the affiliates to administrative regulation. (25a-27a.) In the court's view, it could be "plausibly urged" that Congress did not expressly exempt government securities from Section 20, because Congress understood those instruments were outside its concern, which, the court found, "was primarily with bank affiliate activities in bank-ineligible securities." (30a.) The court held that reading Section 20 to exempt government securities was "essential" to effectuating "Congress' purpose" in enacting that provision. (17a.)

The court below also concluded that the Board reasonably had construed the "engaged principally" standard in Section 20 to mean any "substantial" nongovernmental securities activity. (46a.) The court relied upon *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947), in which this Court held that the term "primarily engaged" in Section 32 of the Act meant "substantially." The court below found the term "engaged principally" in Section 20 synonymous with "primarily engaged" in Section 32. (41a.) The court also agreed with the Board that "substantial" meant no more than ten percent of an affiliate's nongovernmental securities activities. (48a.) Granting the banks' cross-petitions to a limited extent, however, the court rejected the Board's limitation of each affiliate's market share for a particular nongovernmental security. (49a.)

After the court of appeals filed its opinion, the SIA requested the court to defer issuance of its mandate and thereby to continue in effect its stay of the Board's rulings. On February 29, 1988, the court below deferred issuance of its mandate for 15 days to permit the SIA to file its petition with this Court. The

timely filing of this petition has continued that stay until final disposition by the Court. *See* Fed. R. App. P. 41(b).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE

This case is of enormous significance to the financial markets throughout the country. By permitting bank affiliates, as principals, to underwrite nongovernmental securities the decision below radically alters the structure of the nation's financial services industry.

The court of appeals underscored the importance of the issues here by continuing its stay of the Board's rulings, even after its affirmance, in order to maintain the *status quo* pending review by this Court. As the court below had put it, the banks' applications involve an "issue of first impression," and the Board's approvals will significantly "dismantle the wall of separation" Congress built between commercial and investment banking through the Glass-Steagall Act. (5a.)

The Board majority also had acknowledged the status-shattering impact of its actions: its rulings concerned applications that were "precedent-setting" (58a); raised "fundamental questions concerning the scope of the Glass-Steagall Act's restrictions" (57a); and would permit "the first major entry of banking organizations into the field of underwriting and dealing." (134a.) More specifically, as then Chairman Volcker and Governor Angell emphasized in dissent, the majority rulings would permit "affiliations of banks with some of the principal underwriting firms or investment houses of the country" directly contrary, in their view, to "the intent of Congress in passing the Glass-Steagall Act." (137a.)

The Court previously has determined to review issues arising out of SIA challenges to regulatory interpretations affecting the

boundaries between commercial and investment banking "[b]ecause of the importance of the issue for the Nation's financial markets." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137, 142 (1984) ("*SIA* I"); *see Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207 (1984) ("*SIA* II"); *Clarke* v. *Securities Industry Ass'n*, 107 S. Ct. 750 (1987). Of the SIA cases to have reached the Court, however, none has involved banking organizations, *as principals*, underwriting and dealing in securities—activities unquestionably at the crux of the Glass-Steagall prohibitions. No issue in any SIA case has had greater national importance.

1. The rulings represent a fundamental alteration of the Glass-Steagall Act, the basic statutory underpinning for the structure of the entire financial services industry in this country. Passed in June 1933, the Act followed in the wake of the Great Depression and the near-total collapse of the American financial system, as thousands of bank failures occurred across the country.[14] Congress intended the Act to "protect bank depositors from any repetition of [those] widespread bank closings." *Board of Governors* v. *Investment Co. Inst.*, 450 U.S. 46, 61 (1981) ("*ICI* II"). It did so primarily by restricting severely the ability of banks and their affiliates to underwrite and deal in securities.

The Act "responded to the opinion, widely expressed at the time, that much of the financial difficulty experienced by banks could be traced to their involvement in investment-banking activities both directly and through security affiliates." *SIA* I, 468 U.S. at 144. By the end of the 1920s, national banks and their affiliates had expanded their securities activities to the point they "had become the dominant force in the investment banking field."[15] As Senator Glass put it during the Senate debates, 77 Cong. Rec. 3725 (1933):

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14 Willis & Chapman, *The Banking Situation* 7, 10 (1934); Klebaner, *Commercial Banking in the United States: A History* 131-35 (1974).

15 Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 495-496 (1971).

> [I]nvestment affiliates . . . were the largest contributors, next to the gambling on the stock exchange, to the disaster which was precipitated upon the country in 1929.

The Act thus was a "prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse." *ICI* I, 401 U.S. at 639. Rejecting mere regulation of banks' securities activities, Congress adopted "a broad structural approach" in the statute that operated "[t]hrough flat prohibitions" to separate commercial banks from investment banking "as completely as possible." *SIA* I, 468 U.S. at 147.

Section 20 of the Glass-Steagall Act, the provision at issue in this case, spoke directly to bank affiliation with securities underwriters. It provides that no member bank of the Federal Reserve System may affiliate with any entity "engaged principally" in underwriting or dealing in "stocks, bonds, debentures, notes or other securities."[16] The Section contains no exception for *any* type of securities.

Through Section 20, Congress required banks to divest themselves of affiliates involved in underwriting by no later than June 16, 1934. This "absolute divorce of all commercial and investment banking activities" caused one of the most sweeping corporate reorganizations ever experienced in our country,[17] and "revolutionized the structure of the investment banking community."[18] The Act was a "drastic step." *ICI* I, 401 U.S. at 629. As the Court has explained:

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16 12 U.S.C. § 377. Section 20 applies in this case because the proposed securities entities would be affiliated through common ownership with member banks of the Federal Reserve System. If violated, Section 20 bars the affiliation. *See SIA* II, 468 U.S. at 216.

17 Perkins, *supra*, at 525; Carosso, *Investment Banking in America* 369, 371-74 (1970). *See, e.g., New York Times*, June 1, 1934 at 1; *New York Times*, June 8, 1934 at 31; *New York Times*, June 16, 1934 at 21.

18 Carosso, *supra*, at 368.

> The Glass-Steagall Act confirmed that national banks could not engage in investment banking directly, and in addition made affiliation with an organization so engaged illegal. *One effect of the Act was to abolish the security affiliates of commercial banks.*

Id. (emphasis supplied).

The prohibitions of the Glass-Steagall Act have remained firmly in place for over half a century. Those prohibitions are no less significant to the financial markets today than when Congress enacted them in 1933—an importance dramatically underscored by the financial chaos of October 19, 1987. The current structure of the financial services industry, insofar as the issues here are concerned, has also existed throughout that half century. During that period, no bank covered by the Act even sought permission to underwrite nongovernmental securities through affiliates. Now, a bare majority of the Board—without any change at all in the statutory mandate—has permitted just that.

2. The effect of the decision below is all but to nullify the flat prohibitions of the Glass-Steagall Act. It will permit virtually every major money-center bank in the United States immediately to establish affiliates to conduct underwriting and dealing activities that, by congressional mandate as universally understood and applied for over 50 years, have been barred to them. The Board has already approved the applications of thirteen of the largest banking corporations in the country, several of which were the *same* entities whose activities were the focus of congressional debate in 1933. Still further applications continue to be filed by other banking organizations.

Even under the revenue and market share limits initially adopted by the Board, bank affiliates would be able to underwrite and deal in the permitted "ineligible" securities to an extent greater than all but a handful of the largest investment

banks in the country.[19] In combination, the affiliates may control the majority of the market for such securities and again become the dominant force in those markets—just the sort of circumstance that led Congress to enact the Section 20 prohibition in the first place.

The court of appeals went further still, striking down the Board's market share limitation on affiliates' activities. (48a-50a.) As a result, bank affiliates may underwrite and deal in essentially unlimited amounts of nongovernmental securities, because, as the Board itself recognized, the remaining gross revenue "limitation" may easily be manipulated through "the deliberate creation of a large base of eligible activity." (73a n.29.) Banks can, and inevitably will, shift unregulated activities into securities affiliates in order to inflate the gross revenues against which their nongovernmental underwriting and dealing activities would be measured.[20] That, in turn, would permit banking organizations to establish underwriting and dealing operations

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19 For example, under the Board's rulings *each* bank affiliate may underwrite approximately $4.35 billion of municipal revenue bonds—an amount greater than that currently underwritten by all but the six very largest investment firms in this market. (Statement of Jeffrey M. Schaefer, dated January 30, 1987, Joint Appendix ("J.A.") at 216-219, *Securities Industry Ass'n* v. *Board of Governors*, No. 87-4041 (2d Cir. Feb. 8, 1988)). *Each* bank affiliate may also underwrite approximately $2.86 billion of mortgage-related securities—an amount larger than all but the five largest investment firms in this market. (*Id.* at 5-8, J.A. 219-22.) And, *each* bank affiliate may underwrite approximately $50 billion of commercial paper this year, a market for which share data are unavailable. (*Id.* at 9, J.A. 223.)

20 As a leading bank trade publication reported shortly after the opinion below was filed:

> Big banks expect to get around the 5% [gross revenue] limit by padding the base against which their revenues are measured. They will stuff their new activities into existing broker-dealer subsidiaries or into new entities. "We'll just increase revenue in the permissible [*i.e.*, government] securities," said an attorney at Citicorp.

Horowitz, "Court Decision Changes the Landscape," *American Banker*, Feb. 10, 1988 at 15.

in nongovernmental securities rivaling in size those even now matched only by a handful of the country's largest securities houses.[21] Alternatively, banks holding companies could simply absorb major securities firms.[22]

The rationale of the court below would in no way be limited by the Act to underwriting only the types of securities involved in this case. A level of underwriting permitted by Section 20 is permitted for *all* securities—whether speculative stocks or junk bonds. Section 20 makes no distinction among the "securities" it covers. A Congress that sought to separate commercial from investment banking "as completely as possible," *SIA* I, 468 U.S. at 147, could not conceivably have envisioned, let alone intended, anything like the result permitted below.

3. The decision below also raises basic questions concerning the role of administrative agencies in setting national policy. Congress has intensely debated over the past several terms, including the present term, the policy considerations involved in extending new securities authority to bank holding companies. Congress has repeatedly refused to weaken the flat prohibitions

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21 For example, PaineWebber in 1986 derived $695 million in revenue from underwriting and dealing activities in *all* securities. Assuming no more than half of these revenues were from bank eligible activities, Paine Webber's revenue from ineligible activity was approximately $350 million. Citicorp, which in 1986 had revenues of $23.5 billion, could create a securities affiliate underwriting and dealing in ineligible securities on a scale equal to PaineWebber merely by transferring to a separate subsidiary existing activities generating only 15% of its current gross revenues. *See Moody's Banking and Finance Manual* (1987) at 5478 (PaineWebber Group Inc.), 144 (Citicorp).

22 Underwriting and dealing activities (*including* "eligible" as well as other securities), for instance, accounted in 1986 for less than 21% of total revenues at Merrill Lynch & Co., and 18% at E.F. Hutton Group, Inc. Taking into account only the revenues derived from "ineligible" securities activities, even firms of this size could have been acquired by banks, with Glass-Steagall impunity, under the rationale of the holding below. *See* Merrill Lynch & Co., *1986 Annual Report* at 53; E.F. Hutton Group, Inc., *1986 Annual Report* at F-18.

mandated by the Glass-Steagall Act[23] and has expressly confirmed that bank regulators have *no* authority to alter the Act through administrative rulemaking.[24] Congress also reacted sharply to the Board proceedings at issue in this case,[25] with its level of frustration reaching the point that in August 1987, Congress enacted a statutory moratorium lasting until March 1, 1988 upon all Board approvals of the sort at issue. *See* Competitive Equality Banking Act of 1987, § 201, Pub. L. No. 100-86, 101 Stat. 552.

National policy, of course, is to be set by legislative deliberation and not by administrative edict. Any shift in the statutory boundaries between the securities and banking industries requires a fundamental policy decision that can be made only by Congress, because only it can weigh all of the policy considerations involved. As the Board itself recognized in commenting on an earlier application to establish an underwriting affiliate:

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23 For example, in 1984 the House refused even to consider legislation the Senate had passed to authorize bank affiliates to underwrite three of the specific securities the majority's rulings now seek to authorize administratively. S. 2851, 98th Cong., 2d Sess. (1984).

24 In 1980, Congress authorized the Comptroller of the Currency to issue rules and regulations but "expressly continued to withhold from the Comptroller the authority to issue regulations concerning 'securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act." ' " *SIA* I, 468 U.S. at 154 (quoting Depository Institutions Deregulation and Monetary Control Act of 1980, § 708, 94 Stat. 188, 12 U.S.C. § 93a).

25 The Chairman of the Senate Banking Committee had written to the Board before the February 3 hearing that "approval of the applications would contravene the intent of [the Act]" and "would involve a major reversal of policy that can only be effected by the Congress." 133 Cong. Rec. S.4022-23 (daily ed. Mar. 27, 1987). And, after the Board's initial ruling was issued, the Chairman of the House Banking Committee stated that the majority "has misunderstood and misinterpreted the law and congressional intent." *See* Campbell, "SIA Asks Appellate Court to Overrule Fed on Bank Securities Underwriting," *The Bond Buyer*, May 4, 1987 at 3.

> Congress is the appropriate forum for resolution of the public policy considerations involved in proposals . . . that would dramatically alter the framework established by Congress in the Glass-Steagall Act.[26]

By affirming the Board, the court effectively sanctioned just such an administrative effort to "dramatically alter" Congress' Glass-Steagall mandate without any legislative sanction whatever.

In sum, this case involves fundamental issues of overriding national significance. For this reason alone, review by the Court is warranted.

II.

THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND RAISES SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THE COURT

The opinion below contravenes repeated admonitions of the Court concerning the Glass-Steagall Act—its plain language, congressional purpose, statutory structure and administrative interpretation.

1. The Court has instructed repeatedly that the prohibitory terms of the Glass-Steagall Act are to be applied "as they were written."[27] A fundamental issue in this case is the scope of the phrase "stocks, bonds, debentures, notes, or other securities" contained in Section 20 of the Act. The court below ruled that this language, even though unqualified in the Act, should be qualified to exempt government securities. (37a.) This Court, however, has already all but decided that the decision below was wrong.

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26 *Withdrawal of Citicorp Application*, 71 Fed. Res. Bull. 225 (1985).

27 *ICI* I, 401 U.S. at 639; *accord ICI* II, 450 U.S. at 65 (confirming that the Court "relied squarely on the literal language" of the Act).

In *SIA* I, the Court reviewed a ruling in which the Board had exempted certain low-risk securities (commercial paper) from the phrase, "stocks, bonds, debentures, notes, or other securities," contained in the underwriting prohibition of Section 21 of the Act. The Court agreed with the SIA that "the plain language of the Act makes untenable the Board's conclusion that commercial paper is not a 'security' within the meaning of the Act." 468 U.S. at 149. Nullifying the Board's ruling, the Court confirmed that " 'there is nothing in the phrasing of . . . § 21 that suggests a narrow reading of the word "securities" ' " (quoting *ICI* I, 401 U.S. at 635). The Court flatly rejected the Board's "departure from the literal meaning of the Act" and its "attempt to narrow the ordinary meaning of the statutory language." 468 U.S. at 152-53.

Section 20 of the Act, involved here, is equally clear. In language *identical* to that construed by the Court in *SIA* I, Section 20 absolutely bars bank affiliates from engaging principally in underwriting "stocks, bonds, debentures, notes, or other securities." The plain statutory language thus covers all types of "securities" without qualification. And, there is no dispute the instruments at issue (government securities) fall within the literal meaning of that phrase; the court below and the Board majority conceded just that.[28] The result, therefore, should be just as clear. As the dissenting Board members stated, "the plain words of the statute, read together with earlier Supreme Court and circuit court opinions . . . indicate that government securities are indeed 'securities' within the meaning of Section 20." (136a.)

Even so, the court below affirmed the Board majority's refusal to apply the Act's terms as they were written. Instead, the court of appeals "with some confidence" inferred ambiguity in a phrase this Court has already ruled contains none. (14a.) The court then "narrow[ed]" the statutory language of Section 20 and "depart[ed] from its literal meaning." In doing so, the

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28 *See* 67a ("on its face, Section 20 draws no distinction between eligible and ineligible securities"); 13a ("on the surface § 20 would appear to refer to both kinds of securities").

court below did not even cite, let alone attempt to distinguish, this Court's contrary instruction in *SIA* I. The court simply contravened the Court's admonition and thereby Congress' statutory mandate.

2. This Court also has stated that the Board is not to substitute its view of the "plain purpose" of a statute for the "plain language" enacted by Congress. The Board majority, affirmed below, nevertheless supplanted the plain language of Section 20 with its view of the "central purpose" of the Act and again violated what the Court has told the Board.

In *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361 (1986), the Board had relied upon its view of the "plain purpose" of the Bank Holding Company Act, instead of the plain language of the statute, to conclude that certain entities came within that Act's definition of a "bank." Voiding the Board's "invocation of the 'plain purpose' of legislation at the expense of the terms of the statute," the Court stated:

> The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer.

Id. at 374. The Court also underscored the obligation of the Board as well as the courts to enforce statutory language:

> If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[29]

As in *Dimension*, the terms of the governing statute here are "clear and unambiguous." All parties agree the plain language of Section 20 prohibits banks from affiliating with entities engaged principally in marketing "securities" of *any* kind. The affiliates sanctioned by the majority will engage exclusively in marketing securities of various kinds. Accordingly, as the

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29 *Id.* at 368 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

Court put it in *Dimension*, that *should* have been "the end of the matter."

Yet, the court below read into Section 20 an exception for government securities, not because the plain language required that result, but because in the court's opinion that reading was "essential" to effectuate its view of "Congress' purpose in enacting § 20." (17a.) Substituting its own view of the Act's "purpose" for the statutory language used by Congress, the court below, as had the majority of the Board, violated the instructions of this Court.

Ironically, the court's rationale actually undermines the congressional "purpose" it purports to support. According to the court below, Congress' purpose in passing the Act was "to attack . . . bank involvement in speculative securities, that is, bank-ineligible securities." (31a-32a.) The court confirmed that the bank affiliates targeted by Congress in 1933 had been established initially to assume the role of banks in underwriting government securities but then used that base of activity to expand into the distribution of speculative securities as well. (31a.) By exempting government securities from Section 20, however, the court of appeals permitted bank affiliates again to establish a huge revenue base derived from underwriting those securities that in turn will again be used as a springboard for underwriting massive amounts of "bank-ineligible securities."[30] Thus, not only did the court below incorrectly extol its view of Congress' "plain purpose" over Congress' own "plain language," but in doing so, the court also fostered just the activities it found Congress had intended to "attack."

3. This Court has repeatedly stated that, " 'where Congress includes particular language in one section of a statute but

30 As the Board explained (61a):

> Because of the operation of the net capital rules established by the Securities and Exchange Commission for broker-dealers, as a practical matter it is not feasible for bank affiliates to underwrite and deal in ineligible securities, other than commercial paper, within the confines of section 20 unless the subsidiary in which this activity takes place is engaged principally in underwriting and dealing in eligible securities—essentially U.S. government securities.

omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citations omitted). Specifically as to Glass-Steagall, the Court has taught that "the structure of the Act reveals a congressional intent to treat banks *separately* from their affiliates," *ICI* II, 450 U.S. at 59 n.24 (emphasis supplied), and has instructed that "[t]here is no basis for assuming that the dissimilar phrases found in §§ 16 and 20 [of the Glass-Steagall Act] are coterminous. . . . § 16 applies only to banks, not to bank holding companies. . . ." *SIA* II, 468 U.S. at 219 n.20.

Once again, the court below avoided what this Court has said. Congress included an express exemption for government securities in Section 16 and in 1935 also incorporated that exemption into Section 21 of the Act.[31] Congress, however, created *no* such exemption, either initially or by amendment, to the prohibitions of Section 20, which continue to reach "securities" underwriting without exception. By reading Section 20 to encompass the exemption Congress has omitted from that section but included in Sections 16 and 21, the court of appeals obliterated the differences built by Congress into the Glass-Steagall structure as well as this Court's direction concerning its proper application.

4. The Board itself for over 50 years has interpreted the Glass-Steagall term "securities" to include government securities, in a regulation this Court has held applicable to Section 20. The Board issued that interpretation under Section 32 of the Act, which bars personnel interlocks between member banks and entities primarily engaged in underwriting "securities." As in Section 20, the term "securities" in Section 32 is unqualified. Beginning in July 1934, the Board held that "[S]ection 32 *does not contain any exception* based upon the kind of securities underwritten or dealt in," in marked contrast to Section 16 of the Act which, as the Board went on to explain, "specifically ex-

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31 Banking Act of 1935, Pub. L. No. 74-305, Ch. 614, tit. III, § 303(a), 49 Stat. 684, 707, codified at 12 U.S.C. § 378(a)(1).

cepts certain municipal and other obligations'' from its prohibitions. 20 Fed. Res. Bull. 485 (1934) (emphasis supplied).

Acting pursuant to express authority in Section 32 to exempt interlocks ''not incompatible with the public interest,'' the Board then permitted correspondent relationships between member banks and dealers in certain government securities. *Id.* The Board has carried forward this interpretation in its Regulation R, which, even now over five decades later, *exempts* interlocks with entities engaged in underwriting ''only'' government securities—confirming that such entities otherwise are *included* within the flat Section 32 prohibition.[32]

This Court has said specifically that the Board's ''long-accepted interpretation'' in its Regulation R ''should apply as well to § 20.'' *SIA II*, 468 U.S. at 219. Both sections ''contain identical language, were enacted for similar purposes, and are part of the same statute.'' *Id.* And, under that ''long-accepted interpretation,'' government securities are ''securities'' within the language of Section 32.

Despite this Court's teaching and the obvious relevance of the Board's Regulation R to the issues here, the Board majority did not say one word about it in reaching exactly the opposite conclusion as to the scope of the ''securities'' covered by Section 20. The court of appeals agreed the majority ruling was patently ''defective'' for not having done so (15a-16a) and yet committed the same error itself by making no attempt to reconcile its own rationale with the contemporaneous understanding of those who knew best what Congress intended.[33]

Section 32 is unique among the Glass-Steagall provisions in granting the Board any exemptive authority at all. Congress expressly granted the Board administrative authority in Section 32 to exempt personnel overlaps from its interlock prohibitions. In stark contrast, Congress granted the Board *no* exemptive authority in Section 20 to permit affiliations otherwise barred by

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32 12 C.F.R. § 218.2; *see* 16a.

33 *See Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

its plain language. In effect, the court below permitted the Board administratively to assume just the sort of exemptive authority under Section 20 that Congress has withheld.

5. The court of appeals' interpretation of the phrase "engaged principally" in Section 20 equally contravened congressional intent and reflected a "regulatory approach" at odds with this Court's decisions under the Act. By prohibiting bank affiliates under Section 20 from being "engaged principally" in underwriting securities, Congress intended to prohibit banks from indirectly "carrying on . . . the investment security business" through affiliation with entities regularly invo' ed in that business, on a "day to day and week to week" basis.[34] As the Court has confirmed, one effect of the Act was "to abolish the security affiliates of commercial banks." *ICI* I, 401 U.S. at 629. Congress wrote Section 20 to speak "in the language of prohibition, not authorization."[35]

The court below nevertheless interpreted "engaged principally" by a quantitative measure alone that would allow bank affiliates to derive as much as ten percent of their revenues from underwriting privately issued securities—thereby permitting bank affiliates once again regularly to carry on that business and to do so at levels matched only by the largest investment firms in the country. By "authoriz[ing]" rather than "prohibit-[ing]" the reemergence of bank security affiliates on a scale unequalled since 1929, the court of appeals simply reversed Congress' Glass-Steagall intent.

The Board itself confirmed that, at the volume level now sanctioned under Section 20, the proposed underwriting activities would cause a number of the "fundamental hazards" (115a) that were of major concern to the Glass-Steagall Congress. Yet, instead of reducing that volume level to a point at which the potential for those hazards would be *de minimis*, the Board constructed "an extensive framework of prudential limi-

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34 75 Cong. Rec. 9905 (1932) (remarks of Sen. Walcott); *see also* 75 Cong. Rec. 9911 (1932) (remarks of Sen. Bulkley).

35 *Investment Co. Institute* v. *FDIC*, 815 F.2d 1540, 1548 (D.C. Cir.), *cert. denied*, 108 S. Ct. 143 (1987).

tations," (134a) covering everything from lending arrangements to office space (128a-134a). The Board then ruled that, "under the framework established," the activities would "comply with existing law." (127a.)

In affirming the Board, the court below held the "necessity of 'regulation' in carrying out Glass-Steagall's 'prohibitions' " did not violate the Act. (45a.) To the contrary, this Court has left no doubt that administrative guidelines (here, "framework") are *not* to substitute for the Glass-Steagall prohibitions. *SIA* I, 468 U.S. at 153. As the Court bluntly stated, "Congress rejected a regulatory approach when it drafted the statute, and it has adhered to that rejection ever since." *Id.* By ruling as it did, the court of appeals allowed the Board again "effectively [to] convert a portion of the Act's broad prohibition into a system of administrative regulation" (*id.*), and thereby yet again to contravene this Court's direction as well as Congress' purpose "when it drafted the statute" and "ever since."

CONCLUSION

The decision below raises fundamental issues of federal law that have overriding significance for the entire financial services industry. It also conflicts with the Court's prior decisions concerning the scope and application of the Glass-Steagall Act. A writ of *certiorari* should issue to review this decision.

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